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87-959

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No.

PERRY O. MILLER,

Petitioner,

versus

OTIS R. BOWEN, SECRETARY,
DEPARTMENT OF HEALTH AND
HUMAN SERVICES

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DANIEL E. BROUSSARD, JR.
KATHRYN FOWLER VAN HOOF
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ATTORNEYS FOR PETITIONER,
PERRY O. MILLER

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals for the Fifth Circuit departed from the accepted and usual course of judicial proceedings involving remand of Social Security cases as to call for an exercise of this court's power of supervision.

II. Whether the Court of Appeals for the Fifth Circuit sanctioned such a departure by the Western District of Louisiana, Alexandria Division, as to call for an exercise of this court's power of supervision.

III. Whether or not petitioner has a statutory right to remand under Section 405(g) of the Social Security Act.

IV. Whether the Court of Appeals for the Fifth Circuit has applied 42 USC 405(g) so narrowly in the present case as to preclude its application altogether, thereby denying petitioner his statutory right to remand.

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JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 24, 1987. The petition for rehearing was denied August 18, 1987 and said order was filed August 19, 1987.

The jurisdiction of the United States Supreme Court to review the decision of the Court of Appeals for the Fifth Circuit by writ of certiorari is conferred by 28 USC 1254(1).

STATUTORY PROVISIONS INVOLVED

This is an action brought pursuant to Title 42 USC Section 405(g) of the Social Security Act. The pertinent text is set forth in the appendix.

STATEMENT OF THE CASE

This matter arises out of an appeal from the decision of the Appeals Council of the United

States Department of Health and Human Services, Social Security Administration, denying petitioner's eligibility for disability insurance benefits under the provisions of the Social Security Act.

Petitioner, PERRY O. MILLER, filed an application for Social Security Disability Benefits on January 4, 1985, alleging disability since March 15, 1984 due to an injury to his lower back and the loss of reflexes in his left leg.

The medical evidence reflects that petitioner initially injured his back in the summer of 1979. On February 20, 1980, he underwent surgery for removal of the L4-5 and L5-S1 disc. Dr. C. Babson Fresh released Mr. Miller from neurosurgical care on May 29, 1980, almost one year after his injury, and he returned to work.

Petitioner again injured his back after falling at work on March 15, 1984. It is from this date that he alleges his presently existing disability began. He suffered from back pain and left leg pain all the way to the heel, with numbness in the ankle and heel. He subsequently underwent a second surgical procedure, on April 16, 1985, for bilateral hemilaminectomy and foramintomy of L4-5, the site of the previous surgery.

On August 28, 1985, the day after the administrative hearing, petitioner returned to his treating physician and neurosurgeon, Dr. Fresh, with continued complaints of back and leg pain. Dr. Fresh referred Mr. Miller to Dr. John F. Raggio, also a neurosurgeon.

Dr. Raggio stated in his report of December 6, 1985 that further surgery might be necessary. In his report of March 3, 1986,

Dr. Raggio stated that it would be unlikely that petitioner would be able to return to gainful employment in a nonphysical-type job for one (1) to two (2) years.

Dr Fresh stated, in his report of March 31, 1986, that petitioner continued to have low back and bilateral lower extremity pain, which might require surgery in the form of a fusion. Dr. Fresh specifically stated that Mr. Miller was permanently disabled from his prior form of employment and totally disabled from any form of gainful employment at that time.

The aforementioned medical reports of Drs. Fresh and Raggio were secured after the petitioners' administrative hearing and concerned continuing treatment rendered to petitioner after the hearing. These reports were not available for consideration by the

Administrative Law Judge. Attached to petitioner's memorandum in support of plaintiff's motion for rehearing at the district court level, were affidavits of petitioner's counsel which attested to their attempts to timely obtain medical information from his physicians. Two of the medical reports were obtained by petitioner's counsel only through a third party, as evidenced by the name and mailing address on the face of each report.

All three reports were submitted to the Appeals Council on April 1, 1986. The Appeals Council denied petitioner's request for review of the Administrative Law Judge's decision on April 2, 1986, one day later.

Petitioner, PERRY O. MILLER, sought judicial review of the Secretary's final decision by filing an action in the Western District of Louisiana, Alexandria Division. The basis

for jurisdiction in the Federal District Court was 42 USC 405(g).

Attached to the original complaint to set aside the decision of the Appeals Council in this matter were the aforementioned three medical reports which, petitioner contended, represented new medical evidence of his existing disability at the time of the hearing conducted by the Administrative Law Judge.

It was petitioner's position that the new evidence was material and that there was good cause for his failure to include it in the administrative proceedings, warranting remand to the Secretary for further consideration pursuant to 42 USC 405(g).

The Secretary filed a motion to strike the medical reports as extra-record evidence,

asserting that the Court is limited in its review to the pleadings and the transcript of the record pursuant to 42 USC 405(g). The Honorable F. A. Little, Jr., Judge of the United States District Court for the Western District of Louisiana, Alexandria Division, entered judgment granting the Secretary's motion to strike the medical report. Petitioner's motion for rehearing was denied by the trial Court.

Subsequently, the Honorable F. A. Little, Jr. entered judgment granting the Secretary's motion for summary judgment. Petitioner appealed this Judgment to the Court of Appeals for the Fifth Circuit.

Attached to the original brief on behalf of PERRY O. MILLER, petitioner, were the records of St. Francis Cabrini Hospital in Alexandria, Louisiana, which indicate that he

did undergo a L4-5 to S1 posteriolateral fusion with a bone graft from the right iliac crest with placement of an osteostem stimulator on November 18, 1986. The post-operative diagnosis of his attending physician, Dr. C. Babson Fresh, was post-operative fibrosis with bulging disc, L4-5, left.

On July 24, 1987, the Court of Appeals for the Fifth Circuit held that the Secretary committed no reversible error in determining that PERRY O. MILLER was not disabled. The Court further found that the new medical evidence previously submitted, as well as hospital records attached to petitioner's brief on appeal, were not material and that Mr. Miller failed to show good cause for failing to timely produce the new medical evidence submitted. The petitioner's petition for rehearing was denied August 18, 1987.

In so finding, it appears that the Court of Appeals for the Fifth Circuit departed from the accepted and usual course of judicial proceedings by failing to properly consider the new medical evidence submitted pursuant to 42 USC 405(g), effectively denying petitioner his statutory right to remand in this instance. Further, it appears that the Court of Appeals for the Fifth Circuit sanctioned such a departure by the Western District of Louisiana, Alexandria Division, so as to call for an exercise of this Court's power of supervision.

Petitioner has accordingly filed this Petition for Writ of Certiorari, seeking to have the judgments of the lower courts reversed and ordering that this matter be remanded to the Secretary for further consideration in light of the new medical evidence submitted by petitioner pursuant to 42 USC 405(g).

ARGUMENT

42 USC 405(g) provides that a court,

> "may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding..." (emphasis added)

Petitioner contends that the court below erred as a matter of law in finding that the new medical evidence which he submitted after the administrative proceedings herein was not material. The courts below characterized the new medical evidence as not material by finding that petitioner's condition deteriorated after the administrative hearing. Petitioner's hospital records show that he underwent a third surgical procedure after the administrative hearing and also show a post-operative diagnosis by petitioner's treating physician of post-operative fibrosis and bulging discs in the lumbar area of his back.

It is petitioner's position that subsequent back surgery is relevant and material to a Social Security disability claim to the extent it relates to the physical impairment which the claimant alleges gives rise to his disabling pain. Further, results of recent medical treatment give rise to the statutory right of remand to the Secretary for further consideration where there is a reasonable possibility that the new evidence would alter the decision of the Secretary because it relates to the dispositive issue in the case.

This court has never directly addressed and answered the issue presented by this petition for writ of certiorari.

The June 9, 1980 congressional amendment to Section 405(g) of the Social Security Act limited the court's power to remand to the

Secretary to consider additional evidence not contained in the administrative record. The statute does, however, expressly provide for remand where the evidence is new, material and there is good cause for the failure to incorporate such evidence in the record in a prior proceeding. 42 USC 405(g).

Petitioner asserts that, although the amendment somewhat restricts the availability of a remand, it does not preclude its application. It appears that the Court of Appeals for the Fifth Circuit departed from the accepted and usual course of judicial proceedings in cases such as the one at bar by precluding application of Section 405(g) of the Social Security Act and denying petitioner his statutory right to remand. Further, it appears that the appellate court sanctioned such a departure by the Western District of Louisiana,

Alexandria Division, so as to call for an exercise of this court's power of supervision.

The Court of Appeals for the Fifth Circuit reached the conclusion that all of the new medical evidence petitioner submitted failed the test of materiality, citing Chaney v. Schweiker, 659 F. 2d 676, 679 (5th cir. 1981). That case espouses the measure of materiality as being a reasonable possibility that the new evidence would have changed the outcome of the Secretary's determination had it been before him. See also Dorsey v. Heckler, 702 F. 2d 597 (5th cir. 1983).

Although the Court of Appeals for the Fifth Circuit was of the opinion that "At best, the new evidence offered by Miller suggests a deterioration of his condition after the

administrative law judge rendered his decision.", petitioner asserts that the evidence of record does not support the court's conclusion. In fact, the hospital records attached to petitioner's brief of appeal show that the post-operative diagnosis of Dr. Fresh following petitioner's last and most recent surgery was post-operative fibrosis with bulging discs, L4-5, left, which was present after his second surgery and at the time of his administrative hearing.

Petitioner submits that instead of suggesting a mere "deterioration of his condition" after the hearing, all of the new medical evidence submitted supports petitioner's claim of existing disability at the time of the hearing conducted by the administrative law judge. Further, the reports and medical records are evidence of the petitioner's con-

tinuing disability and substantiate the error of the Secretary in denying disability insurance benefits under the Social Security Act. See also Dorsey, supra, Huckabee v. Richardson, 468 F. 2d 1380, 1381 (4th cir. 1972), Mann v. Gardner, 380 F. 2d 182 (5th cir. 1967).

Moreover, the appellate court's consideration of its own medical opinion constituted legal error. The court found that "The fact that Miller's condition later deteriorated to the point that, by November 1986, nearly a year after the administrative law judge issued his decision, surgery was recommended does not justify remand." This finding was obviously significant to this court's decision that the new evidence submitted failed the test of materiality. Considering Dr. Fresh's diagnosis of post-operative fibrosis with bulging

discs, which he did not make until after the hearing and the most recent surgery, the new medical evidence, instead, supports a remand, as accorded by statute, to allow the Secretary to take further evidence as to whether or not Mr. Miller's condition merely deteriorated or was, in fact, disabling at the time of the administrative hearing. Had the Secretary known petitioner in fact was suffering from bulging discs and post-operative fibrosis at the time of the hearing, his views might have been different. After all, the severity of his back condition was the central issue.

Petitioner further submits that although notations in the records from St. Francis Cabrini Hospital suggest that, at the time of his surgery in November of 1986, the petitioner's leg pain could be relieved through

the use of a chair back brace, this does not indicate that petitioner was not disabled throughout the period of his claim. The new evidence, instead, diagnoses the claimant's ailment as a severe disabling impairment requiring surgery. Clearly, petitioner has not been able to work with a condition which required him to use a chair back brace for the relief of pain and which subsequently required him to undergo surgery.

It is submitted that the Court of Appeals for the Fifth Circuit based its affirmance of the trial court's finding on the rendition of an expert medical opinion which was beyond its competence. This resulted in an erroneous interpretation of the medical evidence, the denial of petitioner's statutory right to remand and a finding of nondisability, which is not supported by the law or the evidence.

Additionally, petitioner asserts that the Court of Appeals erred as a matter of law in so narrowly construing the good cause requirement as to depart from the accepted and usual course of proceedings of this type, thereby denying petitioner his statutory right to remand.

The Ninth Circuit Court of Appeals, in Burton v. Heckler, 724 F. 2d 1415 (9th cir. 1984) indicated that the good cause requirement should be liberally applied where there is no showing that a remand for consideration of new evidence will result in prejudice to the Secretary. Burton, supra, at p. 1418. Note Ward v. Schweiker, 686 F 2d 762 (9th cir. 1982), wherein the same circuit held that the fact that new evidence presented had come to light after the Secretary's final decision and, therefore, could not have been

submitted at the administrative hearing, was sufficient to satisfy the good cause requirement.

The Eleventh Circuit Court of Appeals has also found that good cause for failure to submit new evidence at the administrative level was established by the claimant because it did not exist at that time. Smith v. Bowen, 792 F. 2d at 1547 (11th cir. 1986); Cherry v. Heckler, 760 F. 2d at 1192 (11th cir. 1985)

The 4th Circuit Court of Appeals has also found good cause for not submitting new medical records sooner where petitioner underwent a third surgical procedure on the back after the final decision of the Secretary. Borders v. Heckler, 777 F 2d 954 (4th cir. 1985) See also Huffer v. Heckler, 591 F.

Supp. 626, 628 (S. D. Ohio 1984); Czubala v. Heckler, 574 F. Supp. 890, 901-02 (N. D. Ind. 1983). The Tenth Circuit likewise determined that the fact that petitioner underwent a third back operation and was hospitalized for a heart condition after the Secretary's decision also established good cause sufficient to meet the requirements of 42 USC 405(g). Cagle v. Califano, 638 F. 2d 219 (10th cir 1981).

Petitioner recognizes that whether an action should be remanded to the Secretary for the taking of additional evidence is a question which is decided within the discretion of the court. However, the new evidence submitted herein, on its face, clearly shows that petitioner has not been dilatory in procuring and submitting it for consideration. Petitioner is not attempting to sidestep the statutory

requirements of Section 405(g) to gain "another bite at the apple." See Birchfield v. Harris, 506 F. Supp. 251 (E. D. Tenn. 1980).

It should be clear that the evidence which petitioner submitted was not available until after the decision of the administrative law judge. Since these records did not even exist at the time of the hearing, petitioner had good cause for not incorporating them into the record at that time. Additionally, attached to petitioner's memorandum in support of his motion for rehearing in the district court level were the affidavits of counsel for petitioner, regarding their attempts to timely obtain medical information from petitioner's physicians.

The petitioner's hearing by the administrative law judge was held on August 27, 1985.

At that time, counsel for petitioner requested that the record be held open for the medical opinion of the petitioner's physician, Dr. C. Babson Fresh, regarding his present inability to perform substantial gainful employment.

The affidavit of Dorwan S. Vizzier showed that he mailed a letter to Dr. Fresh on September 9, 1985, requesting an updated report as to the dates the petitioner was examined, all tests and/or examinations, findings, diagnoses, course of treatment prescribed and prognosis. Dr. Fresh did submit a medical report, dated October 11, 1985, however, it contained no conclusion as to the petitioner's present ability to perform substantial gainful employment.

The record was reopened November 13, 1985 and Dr. Fresh's report of October 11, 1985, along

with his professional qualifications, were admitted. The record was then closed.

Subsequently, Dr. Fresh referred petitioner to Dr. John F. Raggio, who examined him for the first time on December 6, 1985, some three months post-hearing. Dr. Raggio issued a report which stated that petitioner might be in need of further surgery.

The administrative law judge denied petitioner's claim for disability benefits on January 3, 1986, although the record was still incomplete as to the petitioner's present ability to perform substantial gainful employment.

The affidavit of Daniel E. Broussard, Jr., co-counsel for petitioner, showed that he attempted to obtain medical information from Dr. Fresh on January 27, 1986, by requesting an updated medical report concerning the

petitioner's present condition. The affidavit also showed that Dr. Fresh was informed, in the letter, that this information would be furnished to the Social Security Administration.

Petitioner obtained a second report from Dr. Raggio, dated March 3, 1986, which stated that it was unlikely that petitioner would be able to return to gainful employment in a nonphysical-type job for one to two years.

Finally, Dr. Fresh provided petitioner with a medical report, dated March 31, 1986, some seven months post-hearing. This report was more complete in that it contained conclusions as to the petitioner's present disability. It reported that the petitioner was totally disabled from any form of gainful employment.

It is urged that the Court of Appeals for the 5th Circuit was in error in concluding that petitioner has not shown good cause for failing to resubmit these reports to the administrative law judge or the Appeals Council prior to its decision or to obtain opinions from these doctors at an earlier time. There is no evidence of record to support this conclusion.

It is important to note that the medical reports of Dr. John F. Raggio, dated December 6, 1985 and March 3, 1986, were obtained by petitioner's counsel through a third party, as is evidenced by the name and mailing address on the face of each letter. Dr. Raggio's report of December 6, 1985 was mailed to an insurance adjuster. Copies of these reports were obtained by petitioner's counsel only through inquiries to those parties. This new evidence was secured on March 24, 1986 and March 27, 1986 and was timely

forwarded to the Appeals Council on April 1, 1986.

As previously noted, the Appeals Council denied petitioner's request for review of the administrative law judge's decision one day after these three reports were submitted to it for consideration and petitioner sought judicial review of that decision.

After the trial court's grant of summary judgment in favor of the Secretary of August 22, 1986, petitioner did undergo further surgery on his back. Attached to the petitioner's brief on appeal were the hospital records of St. Francis Cabrini Hospital, which indicate that on November 18, 1986, Mr. Miller underwent an L4-5 to S1 posteriola-

teral fusion with a bone graft from the right iliac crest with the placement of an osteostem stimulator. It is important to note that the diagnosis of his attending physician, Dr. C. Babson Fresh, was post-operative fibrosis with bulging discs, L4-5, left.

Petitioner submits that the appellate court's determination that petitioner did not show good cause for his failure to submit this new evidence before the date of the hearing flies in the face of its own decision in Wilson v. Heckler, No. 85-4178 (5th cir. 1985), an unpublished opinion of record herein. In Wilson, supra, as in the present case, a medical evaluation performed after the hearing confirmed that the petitioner did, in fact, have a physical impairment. Based on the new evidence, the 5th Circuit vacated the

decision of the Honorable F. A. Little, Jr., Judge, Western District of Louisiana, Alexandria Division, denying petitioner disability benefits, and remanded the case to the Secretary for reconsideration.

It is urged that the petitioner in this case should not be penalized solely because of the failure of his treating physician to include an opinion as to the petitioner's present inability to perform gainful employment in the report he rendered that was submitted to the administrative law judge.

Whether or not petitioner has a statutory right to remand under Section 405(g) of the Social Security Act and has been denied that right is an important question of federal law which has not been, but should be, settled by this Court.

Succinctly stated, it is petitioner's position that the Fifth Circuit Court of Appeals has applied 42 USC 405(g) in the present case so narrowly as to preclude its application altogether, thereby denying petitioner his statutory right to remand. This result was not contemplated by the June 9, 1980 amendment to the Social Security Act, Pub. L. 96-265 Title III, Section 307, 94 Stat. 458 (1980). That amendment, although intended to somewhat restrict the availability of remand, was not intended to be used as a directive to preclude remand where new evidence of disability and hospitalization subsequent to the administrative hearing prove a Social Security claimant's disability.

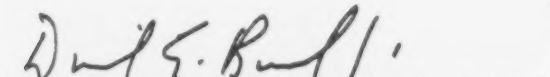
Petitioner submits that the decision of the Fifth Circuit denies him the opportunity to present to the Secretary the post-hearing

evidence of Dr. Fresh's findings concerning his medical condition at the time of the hearing, when those findings were obviously relevant to his condition and were not available.

For the foregoing reasons, petitioner respectfully submits that this petition for writ of certiorari should be granted and the judgments of the courts below should be reversed and that this matter should be remanded to the Secretary for further consideration of the new evidence submitted.

Respectfully submitted,

BROUSSARD, BOLTON,
HALCOMB & VIZZIER

BY: 

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C E R T I F I C A T E

I hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari has been sent to Ms. Sonia P. Cassidy, Assistant United States Attorney, Western District of Louisiana, 3B12 Federal Building, 500 Fannin Street, Shreveport, Louisiana 71101, and to Solicitor General, Department of Justice, Washington, D. C. 20530, by placing same in the United States Mail, postage prepaid, properly addressed, this 13th day of November, 1987, at Alexandria, Louisiana.

OF COUNSEL

STATE OF LOUISIANA

PARISH OF RAPIDES

Before me, the undersigned authority, personally came and appeared Daniel E. Broussard, Jr., who did depose and state that he is counsel of record for PERRY O. MILLER in proceedings for judicial review of the decision of the Appeals Council of the United States Department of Health and Human Services, Social Security Administration, denying Mr. Miller's eligibility for disability insurance benefits under the provisions of the Social Security Act; that said proceedings arise out of Mr. Miller's claim for Social Security disability benefits beginning March 15, 1984; that the affiant did on the 13th day of November, 1987, deposit with Federal Express, with postage prepaid and properly addressed to the Clerk of the United States Supreme Court, the foregoing

petition for writ of certiorari; and that the aforesaid date was within the time allowed for filing by the United States Supreme Court.

DANIEL E. BROUSSARD, JR.

SWORN TO AND SUBSCRIBED before me, Notary Public, this 13th day of November, 1987.

Notary Public

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-4174

PERRY O. MILLER,

Plaintiff-Appellant,

versus

OTIS R. BOWEN, M.D., Secretary,
Health and Human Services,

Defendant-Appellee.

Appeal from the United States District Court
for the
Western District of Louisiana

Filed: August 19, 1987
ON PETITION FOR REHEARING

(August 18, 1987)

BEFORE Rubin, Randall and Higginbotham, Circuit Judges.

Per Curiam:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/United States Circuit Judge
United States Circuit Judge

==========

(g)Judicial review. Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript

of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary,

but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified finding of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-4174
Summary Calendar

PERRY O. MILLER,

Plaintiff-Appellant,

versus

OTIS R. BOWEN, M.D., Secretary,
Health and Human Services,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(CV-86-0865-A)

Before RUBIN, RANDALL, and HIGGINBOTHAM, Circuit Judges.

RUBIN, Circuit Judge:*

Because we find that the Secretary committed no reversible error in determining whether Perry O. Miller was disabled, the record contains

*Local Rule 47.5 provides: "The publications of opinions have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion shall not be published.

substantial evidence to support the finding that he was not "disabled" as that term is defined by the Social Security Act, and Miller has failed to show good cause for his failure to produce in a timely fashion evidence he now contends would entitle him to a remand for further consideration by the Secretary, we affirm the district court's summary judgment. Moreover, none of the evidence that Miller now wishes to have considered would have been reasonably likely to change the decision of the Secretary. The additional reports Miller has submitted and fact that he underwent surgery almost a year after the Secretary's final decision does not warrant remand, for this evidence does not prove his earlier disability and may how no more than a subsequent deterioration of his condition.

I.

A social security claimant has the burden of proving his disability by establishing that, for

at least twelve months, he has an impairment that prevents him from engaging in any substantial gainful activity. 1/ The Social Security Act defines "physical or mental impairment" as "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrated by medically acceptable clinical and laboratory diagnostic techniques." 2/ Our court is limited to determining whether there is substantial evidence in the record to support the decision of the Secretary, and must not reweigh the evidence or try the issue de novo. 3/

1/42 U.S.C. Section 423(d)(1)(A), 1382c(a)(3)(A) (1982); Cook v. Heckler, 750 F2d 391, 393 (5th Cir. 1985).

2/ 42 U.S.C. Section 423(d)(3), 1382C(a)(3)(C).

3/ 42 U.S.C. Section 405(g); Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420 (1971).

The Secretary's regulations dictate a five-step sequential process to be followed in evaluating each claim for disability benefits; (1)

Is the claimant currently working? (2) Does the claimant have a severe impairment? (3) Does the impairment meet or equal an impairment listed in Appendix 1? (If so, disability is automatic.) (4) Does the impairment prevent the claimant from doing past relevant work? and finally, (5) Does the impairment prevent the claimant from doing any other work? 4/

4/ 20 C.F.R. Section 404.1520 (1986).

Once a claimant has shown he cannot perform his past relevant work, the burden of going forward with the evidence shifts to the Secretary. The Secretary must then show that the claimant has the residual ability to do some kind of work. 5/ The regulations direct the Administrative Law Judge (ALJ), in deciding whether the Secretary has met this burden, to apply vocational regulations, 6/ and the Supreme Court has upheld the

use of these vocational regulations by the Secretary in lieu of calling a vocational expert to testify. 7/

5/ Jones v. Heckler, 702 F2d 616, 620 (5th Cir. 1983).

6/ 20 C.F.R. Part 404, Subpart P, Appendix 2, section 200.00 (1986); see also 20 C.F.R. sections 404.1566, 4041569 (1986).

7/ Heckler v. Campbell, 461 U.S. 458, 103 S.Ct. 1952 (1983).

To apply the regulations, findings as to the claimant's residual functional capacity, age, education and work skills are made to determine his profile. If the profile matches one of the rules set out in the tables in Appendix 2, the rule indicates whether or not the claimant is disabled. 8/ We turn to the evidence of record to apply the regulations.

8/ 20 C.F.R. Part 404, Subpt. P. App. 2, Section 200.00(a) 1986).

Miller contends that he is disabled primarily as a result of injuries to his back, which he alleges have caused significant back and leg pain. The Secretary does not deny that he has seriously injured his back. The injury occurred in March 1984. His surgeon thereafter reported improvement in his condition and lessening of his previously reported pain.

The doctor noted both that Miller related significant improvement and that he appeared more comfortable. His limp was less pronounced and straight leg raising produced only minimal discomfort. The doctor reported that in May he was doing even better, having less back pain and less intense leg pain. Moreover, the range of motion of his lumbar spine had improved. By August 1984, Miller had an adequate range of motion in his back and no area of tenderness. He told his doctor that he was "doing okay" and that

he had "a little bit of back pain" especially when bending.

The doctor reported in September 1984 Miller was "definitely more active." Miller informed the doctor that he had back and leg pain when he attempted to do "anything strenuous." He was able to bend to within a few inches of touching his toes and straight leg raising was performed without discomfort. In November 1984, according to the doctor, Miller's condition remained the same. The doctor then recommended that he be trained for work less strenuous than his previous job, a statement that strongly implies the opinion that Miller was not totally disabled.

Miller failed to recover fully and again submitted to back surgery in April 1985. The surgeon's notes show positive benefit from surgery. In May 1985, the doctor noted that Miller "symptomatically was doing quite well following his surgery." He had been doing a lot

of walking and range of motion of the spine was "really quite good." Although he still limped, the surgeon believed that this was only a habit.

In June 1985 Miller reported to the surgeon that he was "doing relatively well." His left leg pain was intermittent and related to activity. However, his main complaint was "simply that he just got fatigued easily with his legs." The surgeon found only mild tenderness and no muscle spasm. He found that the range of motion of Miller's spine was "relatively good," for Miller was able to bend to within twelve inches of touching his toes.

The last medical report submitted to the ALJ resulted from an examination one week after the hearing. Although Miller had reported to his doctor that he had again begun to have leg pain and stiffness in his back, the doctor was unable to explain the reported recurrence of pain. He noted that Miller had a range of spinal motion

'quite better than anticipated." He was able to come within eight to ten inches of touching his toes, an improvement over the previous exam. He expressly stated that he did not believe Miller's alleged pain represented a recurrent disc herniation.

Thus the reports of Miller's treating physician provide substantial evidence supporting the decision of the Secretary that his back injury and pain were not totally disabling.

Miller takes issue with the ALJ's finding that his complaints of pain, as recited at the hearing, were exaggerated. There was clearly a reasonable basis for this finding, for Miller's testimony was not consistent with the medical reports. For instance, he testified that he had received no benefit from surgery, but, as we have noted, his surgeon thought otherwise. Similarly, his testimony that he "wasn't able to do nothing" from the time of the accident until

surgery was directly contradicted by the medical reports.

Pain in some degree is not an automatic ground for finding disability. Whether pain is disabling is a question of fact to be determined, at least initially by the ALJ. 9/ While the ALJ must consider the claimant's subjective complaints as trier of fact, the hearing officer may find from the medical evidence that the complaints are exaggerated. 10/

9/ Jones v. Heckler, 702 F.2d at 621-22

10/ Johnson v. Heckler, 767 F2d 180, 182 (5th Cir. 1985).

Miller argues that it was inappropriate to use the medical-vocational guidelines because the rules do not describe his limitations accurately. He argues that his "limitations are not to sit or stand for any length of time or perform a lot of bending and lifting." We reject a similar argu-

ment in Hernandez v. Heckler, 11/ in which we held that it was not improper for the Secretary to use the medical-vocational guidelines if the claimant did not have nonexertional limitations that significantly affected his ability to perform sedentary work. Most of the limitations that Miller reports, such as inability to stand for prolonged periods or to lift, are limitations that are considered to be exertional limitations. As such, they are factored into the definition of light work. 12/ To the extent, however, that a claimant experiences substantial pain while simply sitting or engaging in other nonexertional activities, he is entitled to have that fact taken into consideration as a factor outside the medical vocational guidelines. 13/

As Miller notes, the ALJ evaluating his claim concluded that Miller suffered "no nonexertional impairments" and therefore that the vocational guidelines "directed" a finding of "not

disabled". Whether the ALJ misunderstood the significance of nonexertional pain is not clear from the record. Given his finding that Miller's complaints of pain were exaggerated, the ALJ may have determined that Miller suffered no substantial effects of pain during nonexertional activities. Although we might be inclined to interpret the evidence differently, the doctors' reports contain substantial evidence supporting such a finding. Moreover, even if the ALJ erred in concluding that Miller's pain created no nonexertional impairment, his conclusion that Miller exaggerated the extent of his pain and remains capable of performing substantial gainful activity is well-supported by the record. Therefore, we are satisfied that a remand to correct any error that may have occurred could not result in a reversal of the ALJ's ultimate disability determination. Because the Secretary's determination clearly does not trespass the statute,

remand for clarification of the ALJ's findings in this respect would serve no purpose justifying the action. 14/

11/ 704 F.2d 857 (5th Cir. 1983).

12/ See 20 C.F.R. Section 404.1567 (1986).

13/ Pettijohn v. Heckler, 759 F.2d 669 (8th Cir. 1985). See also Dellolio v. Heckler, 705 F.2d 123, 127 (5th Cir. 1983).

14/ See Ware v. Schweiker, 651 F.2d 408, 412 (5th Cir. Unit A 1981).

II.

Section 205(g) of the Social Security Act specifies the circumstances under which social security appeals may be remanded to the Secretary for further administrative proceedings:

> The court . . . may, at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding. . . . 15/

This provision was enacted to limit the discre-

tion of federal courts to remand for consideration of new evidence. 16/

15/ 42 U.S.C. Section 405(g) (1982) (Emphasis added).

16/ Willis v. Secretary of HHS, 727 F2d 551, 553-54 (6th Cir. 1984).

Miller contends that he has several medical reports not previously submitted to the ALJ or the Appeals Council and that we should remand for consideration of them and for consideration of the fact that he has had a surgical procedure since the hearing. He may also be understood to content that this evidence may be considerd by this court as a basis of reversing the decision of the Secretary to award benefits to appellant. The evidence includes a report of John Raggio, M.D., about an examination in December 1985. This report, however, was not submitted to the ALJ prior to his decision in January 1986 nor was it submitted to the Appeals Council before its

action on Miller's request for review. Letters from Dr. Raggio, dated March 3, 1986, and from Dr. Fresh, dated March 31, 1986, were not submitted to the Appeals Council until after it had denied Miller's request for review.

Miller has shown no cause for his failure to submit Dr. Raggio's December report to the ALJ or for his failure to submit this and the other reports to the Appeals Council before its decision, nor has he shown any reason for his failure to obtain opinions from these doctors at an earlier time. 17/

17/ Bradley v. Bowen, 809 F.2d 1054, 1058 (5th Cir. 1987).

Moreover, all of the evidence that Miller wishes to submit on remand fails the test for materiality. We have held that, to be material, the evidence must create a "reasonable possibility" that the Secretary's determination would have been different had he considered it, 18/ and the

new evidence must relate to the time period for which benefits were denied, and not concern a later-acquired disability or subsequent deterioration of a previously non-disabling condition. 19/

18/ Chaney v. Schweiker, 659 F2d 676, 679 (5th Cir. 1981).

19/ Johnson v. Heckler, 767 F2d at 183.

At best, the new evidence offered by Miller suggests a deterioration of his condition after the ALJ rendered his decision. In his March 3 letter, Dr. Raggio noted that Miller's condition apparently had improved gradually until August 1985, when deterioration began. At that time Dr. Raggio stated that he was not recommending spinal fusion surgery. The fact that Miller's condition later deteriorated to the point that, by November 1986, nearly a year after the ALJ issued his decision, surgery was recommended does not

justify remand. Similarly, the conclusions offered by Drs. Raggio and Fresh that Miller was temporarily incapable of performing any gainful employment in March 1986 or the near future conclusively establishes neither Miller's disability at that time nor his entitlement to benefits for the period claimed. Additional evidence of Miller's condition would be necessary to evaluate his condition as of March, and, if the evidence supported a contrary conclusion, the Secretary would remain free to reject the opinions of Miller's physicians. 20/ Moreover, Dr. Raggio's and Dr. Fresh's new reports offered no evidence establishing that Miller was disabled throughout the period of his claim, and records from St. Francis Cabrini Hospital suggest that, even at the time of his November 1986 surgery, Miller's pain could be relieved completely in his leg and 90% in his back through use of a chair back brace. It therefore appears unlikely that the

reports would have changed the Secretary's decision on Miller's current claim.

20/ Oldham v. Schweiker, 660 F2d 1078, 1084 (5th Cir. 1981).

For the reasons stated above, Miller has not demonstrated good cause for remand, and the judgment is therefore AFFIRMED.

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

PERRY O. MILLER

vs. CIVIL ACTION NO. 86-0865-A

OTIS BOWEN, SECRETARY,
DEPARTMENT OF HEALTH
AND HUMAN SERVICES

(Filed: February 26, 1987)

R U L I N G

Cross-motions for summary judgment have been filed in this action which was instituted by the claimant, Perry O. Miller, to recover benefits under the Social Security Act, 42 U.S.C. Section

405(g), et seq. Mr. Miller's claim was denied by the Administrative Law Judge (ALJ) after a hearing, and the Appeals Council declined to review the ALJ's decision. That being the case, the decision of the ALJ is adopted as the final decision of the Secretary.

Mr. Miller is 44 years old, completed the ninth grade in high school, and is able to read, write, add and subtract. His most recent employment was as a welder. He had also worked as a mechanic and a farmer. Miller claims that he is disabled due to a back injury, loss of reflexes in the left leg, diabetes, kidney stones and depression.

The claimant's first back injury occurred in 1980 as a result of an accident at work. After a myelogram showed herniated discs at L4-5 and L5-S1, he underwent surgery to remove the discs. Mr. Miller recovered satisfactorily from the surgery and was able to return to work. Miller

reinjured his back on 15 March 1984 during a fall while at work. In May a myelogram was performed, indicating a very mild bilateral nerve root sheath impingement (Tr. p. 141). On 16 April 1985 Miller underwent a bilateral hemilaminectomy and formintomy of L4-5 with excellent postoperative pain relief (Tr. p. 142). When seen on 15 May by his treating physician, Dr. C. Babson Fresh, Miller was complaining of some back pain. Although Dr. Fresh noted that the range of motion in the lumbar spine was "really quite good," as was the right and left lateral bending and extension, Miller required some coaxing to get him to give a maximum sustained effort (Tr. p. 142). Fresh noted that the claimant still limped, although he felt it was habit more than anything else.

In June, the claimant was doing quite well, working on getting rid of his limp. His main complaint to Dr. Fresh was fatigue in his legs.

In August, Miller complained of leg pain, particularly in the left leg. Dr. Fresh found the range of motion in the lumbar spine "quite better than anticipated" with the claimant able to come within 8 to 10 inches of touching his toes. Straight leg raising to 90° was possible. Dr. Fresh felt that the pain was probably due to a recurrent disc herniation. The claimant was ordered to continue his walking and exercise and to obtain a whirlpool unit for morning and evening use (Tr. pp. 142-143).

In his examination before the ALJ, Miller stated that that he spends his time watching television, walking around, and taking occasional naps. He accompanies his wife to the store but remains in the car. He does not drive. Miller stated that he requires assistance from his wife in order to get in and out of the bathtub. He also stated that he requires help with dressing. The ALJ noted, pursuant to this testimony, that

Miller was only 4 months postoperative and that his pain complains appeared to be exaggerated (Tr. p. 11). The ALJ felt that Miller's pain complaints were exaggerated due to the fact that Dr. Fresh felt that Miller was able to perform light work up until April of 1985 and again within less than 12 months afterwards (Tr. p. 12)

Miller testified that although he is diabetic, his symptoms are controlled with medication (Tr. p. 28). Miller also stated that he suffers from kidney stones, but the pain attributed to this condition is also controlled by medication (Tr. p. 29). If a medical condition can be controlled with the use of medication, it will not be found to be disabling. James v. Bowen, 793 F2d 702 (5th Cir. 1986).

The review of this Court is limited to whether the Secretary's findings are supported by substantial evidence in the record as a whole.

42 U.S.C. Sec. 405(g); Watts v. Harris, 614 F.2d 515 (5th Cir. 1980). Substantial evidence is defined as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Deters v. Secretary of Health, Education and Welfare, 789 F.2d 1181 (5th Cir. 1986); Simmons v. Harris, 602 F.2d 1233 (5th Cir. 1979). The reviewing court "may not decide the facts anew or substitute its judgment as to the credibility of evidence for that of the Secretary." Id. at 1235. The Court must, however, review the record as a whole to determine the reasonableness of the decision. Id. at 1236; Singletary v. Bowen, 798 F.2d 818 (5th Cir. 1986).

The claimant bears the burden of proving disability within the meaning of the Act. Johnson v. Harris, 612 F.2d 993, 997 (5th Cir. 1980); Fortenberry v. Harris, 612 F.2d 947, 949

(5th Cir. 1980); Demandre v. Califano, 591 F.2d 1088, 1090 (5th Cir. 1979). Initially, the claimant must prove disability by showing he is unable to perform his previous work. The burden then shifts to the Secretary to show the claimant is capable of performing other substantial gainful employment. Johnson v. Heckler, 767 F.2d 180 (5th Cir. 1985); Spencer v. Schweiker, 678 F.2d 42 (5th Cir. 1982).

The sole issue of contention is whether the claimant is disabled within the meaning of the Social Security Act. Disability claims are evaluated under a sequential process which requires the Secretary to determine whether Miller: (1) is presently working; (2) has a severe impairment; (3) is unable to do the kind of work he did in the past; (4) has an impairment listed in, or medically equivalent to those listed in, 20C.F.R. Part 404, Subpt. P, App. 1; and (5) can perform any other type of work. The ALJ found that

Miller had not engaged in substantial gainful activity since 15 March 1984, has a severe back impairment which prevents him from performing his previous employment, but that his impairment, or combination of impairments, is not listed in or medically equivalent to those listed in App. 1, Subpt. P of 20 C.F.R. Part 404. The ALJ concluded that considering the claimant's residual functional capacity, age, education and work experience, that he is not disabled (Tr. p. 12).

To conclude that the claimant could perform substantial gainful employment and was therefore not disabled, the ALJ applied the tables in App. 2 of 20 C.F.R. Part 404, Subpt. P. Considering the claimant's age of 44, his limited education, his previous work experience, and application of the tables in App. 2 directed a finding of not disabled under Rule 202.18. The ALJ concluded that light work was within the residual functional capacity of the claimant.

Based upon the foregoing, it is this Court's opinion that substantial evidence exists to support the Secretary's decision denying the claimant benefits. Therefore, the Secretary's motion for summary judgment is GRANTED and the claimant's claim is DISMISSED.

SIGNED in Alexandria, Louisiana on 26 February 1987.

/s/ F. A. Little, Jr.
F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

PERRY O. MILLER

vs. CIVIL ACTION NO. 86-0865-A

OTIS BOWEN, SECRETARY
DEPARTMENT OF HEALTH
AND HUMAN SERVICES

(Filed: February 25, 1987)

R U L I N G

For written reasons assigned this date, it is

ORDERED that the Secretary's motion for summary judgment is GRANTED and claimant's claim is DISMISSED with prejudice at his cost.

SIGNED in Alexandria, Louisiana on 26 February 1987.

/s/ F. A. Little, Jr.
F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

PERRY O. MILLER

vs. CIVIL ACTION NO. 86-0865-A

OTIS BOWEN, SECRETARY
DEPARTMENT OF HEALTH
AND HUMAN SERVICES

(Filed: September 23, 1986)

R U L I N G

Plaintiff appealed the decision denying eligibilty for disability under the Social Security

Act, which decision was made by the Appeals Council of the United States Department of Health and Human Services. Plaintiff attached the recent medical reports of Drs. Babson Fresh and John F. Raggio. These reports were not used as evidence in the administrative proceedings previously held. They were made the subject of a motion to strike by defendant. Defendant's motion to strike is GRANTED. A federal district court considering an appeal from administrative proceedings may not review evidence which was not of record before the Secretary. Mann v. Gardner, 380 F.2d 182, 187 (5th Cir. 1967), "Reviewing courts are restricted to the administrative record in performing their limited function of determining whether the Secretary's decision is supported by substantial evidence." Huckabee v. Richardson, 468 F.2d 1380, 1381 (4th Cir. 1972) (citing Domanski v. Celebrezze, 323 F.2d 882, 885 (6th Cir. 1963), cert. denied, 376 U.S. 958, 84

S.Ct. 980, 11 L.Ed. 976 (1964); 42 U.LS.C. Sec. 405(g).

The Court must also observe that counsel for claimant asked that the original record remain open to file a new medical opinion from Babson Fresh. The trial of 27 August 1985 was reopened on 13 November 1985 to admit the lengthy Fresh report of 11 October 1985. The medical from Raggio, a new physician, comes after the Administrative Law Judge's decision. The medical proffered comes too late.

MOTION GRANTED.

SIGNED in Alexandria, Louisiana on 22 September 1986.

/s/F. A. Little, Jr.
F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES COURT OF APEALS
FOR THE FIFTH CIRCUIT

No. 85-4178
Summary Calendar

LEONARD J. WILSON,

Plaintiff-Appellant

versus

MARGARET M. HECKLER, Secretary
of Health and Human Services,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

(August 15, 1985)

Before CLARK, Chief Judge, WILLIAMS and

HIGGINBOTHAM, Circuit Judges.

PER CURIAM:*

Leonard J. Wilson appeals the district court's decision affirming the Secretary's denial of his application for disability benefits. Because the Administrative Law Judge's

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

findings were influenced by Wilson's physicians' inability to determine whether Wilson's complaints of back pain stemmed from a physical impairment, and because medical evaluations performed after the hearing confirmed that Wilson indeed had a physical impairment, we vacate and remand for administrative consideration of the new evidence.

I

Wilson was working as a derrickman for a drilling company when, in February of 1982, he slipped and fell on a drilling rig. After a short hospitalization, he was released, but he returned to the hospital in April complaining of severe back and leg pain. At that time, Dr. John Patton observed that Wilson was in "severe pain," and reported muscle weakness and sensory loss in Wilson's left leg and foot. Dr. Patton diagnosed Wilson as having a "(p)robable left L4-5 herniated nucleus pulposus," and scheduled Wilson

for a CT scan. The scan results were "not entirely satisfactory." A repeat scan was scheduled, but Wilson, citing "family problems that he had to resolve," left the hospital before it could be done.

Wilson returned to see Dr. Patton in June 1982, saying that he was "in excruciating pain." Dr. Patton again diagnosed a probable herniated disc, and orderd a second CT scan, which showed no abnormalities. Wilson continued to complain of pain, and Dr. Patton scheduled a myelogram, which "showed a questionable abnormality." After the myelogram, Dr. Patton examined Wilson in December of 1982, and found him "a very difficult patient to evaluate" because of his reluctance to perform the maneuvers necessary for evaluation of muscle weakness and sensory loss. Dr. Patton assessed Wilson as suffering form "(b)ack and bilateral leg pain of undetermined etiology," and suggested another CT scan.

In the meantime, Wilson had applied for disability benefits. After initial administrative denials, Wilson received a hearing before an Administrative Law Judge in December of 1982. The ALJ, based on the evidence outlined above, issued a written decision in June of 1983. He found that "no one has been able to establish for sure just what is causing (Wilson's) complaints of continued back and leg pain," and that "the objective medical findings do not establish the existence of a condition that would cause the degree of pain and total limitation of function the claimant alleges." The ALJ nevertheless assumed that Wilson had some sort of severe low back impairment, but rejected Wilson's assertion that the impairment was producing disabling pain: "Actually, in view of the objective medical findings his complaints are not too credible." The ALJ also observed that the 300-pound Wilson had not lost any weight due to his pain, and opined

that if Wilson was truly in severe pain, he would have undergone back surgery despite the fact that his workmen's compensation insurer was then disputing coverage. The ALJ thus denied Wilson's claim for benefits. The Social Security Administration's Appeals Council affirmed, and Wilson filed a petition for review in the district court under 42 U.S.C. Sec. 405(g).

While Wilson's appeals to the Appeals Council and the District Court were pending, Wilson continued to see Dr. Patton. Because the local CT scan facilities refused to rescan Wilson unless he lost weight to 250 pounds or less, Dr. Patton finally recommended that Wilson undergo a discogram under general anesthesia. Dr. Patton performed this operation in October of 1983, and discovered a definite herniated disc at L4-L5 and a "bulging" disc at L5-Sa. The doctor injected chymopapain into Wilson's spine to dissolve the discs, a procedure which dramatically improved

Wilson's condition. By March of 1984, Wilson was free of pain, and Dr. Ptaton certified that he could return to light work involving lifting of 20 pounds or less. Wilson submitted this evidence to the district court. That court, citing Dr. Patton's final report, held that because Wilson could do light work, he was not then disabled, and granted the Secretary's motion for summary judgment.

II

Setction 405(g) of the Social Security Act provides that a court "may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in an prior proceeding. . . . ." We have interpreted this claus as justifying a remand if "there is a reasonable possibility that the new evidence would have

changed the outcome of the Secretary's determination had it been before him." Johnson v. Heckler, ____F.2d____, slip op. 5910, 5913 (5th Cir. Aug. 5, 1985), quoting Dorsey v. Heckler, 702 F.2d 597, 604-05 (5th Cir. Aug. 5, 1985), quoting Dorsey v. Heckler, 702 F.2d 597, 604-05 (5th Cir. 1983). As we said in Johnson, the new evidence must "relate to the time period for which benefits were denied(.)" ____F.2d____, slip op. at 5913-14, quoting Szubak v. Secretary of Health & Human Services, 745 F.2d 831, 833 (3d Cir. 1984).

While, as the district court stated, the post-hearing medical evidence shows that Wilson was not disabled after March 1984, the new evidence also casts light on the qustion of Wilson's disability before that date. In his original decision, the ALJ cited the lack of a positive medical diagnosis as a primary reason for his rejection of Wilson's assertions of pain. Had

the ALJ known that Wilson in fact had suffered from a herniated disc, his views might have been different. In Mann v. Gardner, 380 F.2d 182 (5th Cir. 1967), the Secretary had denied Mann's application for benefits, concluding that his claims of back pain were a "psychoneurotic conditoin." When Mann, on appeal, submitted a new medical report diagnosising his ailment as a herniated disc, we remaned to the Secretary for reconsideration of the case in light of the new evidence. Id. at 187. The facts here are strikingly similar to those in Mann, and we reached the same result. See also Dorsey, 702 F.2d at 604-607; Epps v. Harris, 624 F.2d 1267, 1273 (5th Cir. 1980); Johnson v. Harris, 612 F.2d 993, 998-99 (5th Cir. 1980). Cf. Johnson v. Heckler, _____F.2d____, slip op. at 5913-14 (where new evidence showed only deterioration of a previously nondisabling condition, remand was improper).

The district court's judgment is VACATED, and the case is REMANDED to the Secretary for reconsideration of whether Wilson was disabled between February 1982 and March 1984 in light of the complete medical record.

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

PERRY O. MILLER

CIVIL ACTION NO. 86-0865-A

-vs-

OTIS BOWEN, SECRETARY
DEPARTMENT OF HEALTH
AND HUMAN SERVICES

(Filed: November 26, 1986)

R U L I N G

The claimant, Perry O. Miller, instituted an action in this Court pursuant to Sec. 205(g) of the Social Security Act, seeking to reverse a decision of the Secretary of Health and Human

Services denying him disability insurance benefits. Along with his pleadings, the claimant attached two recently obtained physicians reports, which were not made a part of the record before the Secretary. This Court previously granted the Secretary's motion to strike the new reports as untimely submitted. The claimant has filed a motion for a rehearing, contending that the proper remedy for the newly submitted reports is a remand to the Secretary.

It is well settled that the district court may not consider evidence in an appeal from an administrative proceeding which was not before the Secretary. Mann v. Gardner, 380 F.2d 182, 187 (5th Cir. 1967). A district court may, however, evaluate the new evidence to determine if the criteria for a remand have been met. The criteria for a remand are set out in Sec. 405(g) of the Social Security Act, which provides in pertinent part:

> The court may...at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for a failure to incorporate such evidence into the record in a prior proceeding: and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based.

Therefore, to justify a remand, the evidence in question must be new, material, and good cause must be shown for failure to submit it in the prior proceeding. The Fifth Circuit has interpreted "material" to mean that "there is a reasonable possibility that the new evidence would have changed the outcome of the Secretary's decision had it been before him." Johnson v. Heckler, 767 F.2d 180, 183 (5th Cir. 1985), quoting, Dorsey vs. Heckler, 702 F.2d 597, 604-605 (5th Cir. 1983). The importance of the materiality

concept was highlighted in Chaney v. Schweiker, 659 F.2d 676 (5th Cir. 1981):

> The concept "material" suggests that the new evidence must be relevant and probative. However, not every discovery of new evidence, even if relevant and probative, will justify a remand to the Secretary, for some evidence is of limited value and insufficient to justify the administrative costs and delay of a new hearing. Thus we hold that a remand to the Secretary is not justified if there is no reasonable possibility that it would have changed the outcome of the Secretary's determination.

Id. at 679.

One of the reports in question was a letter prepared by Dr. Fresh, the claimant's treating physician. The letter from Dr. Fresh is clearly immaterial. It consists of two paragraphs and states the doctor's opinion that the claimant is permanently disabled with regard to his prior employment and temporarily disabled with regard to any other type of employment. This letter is merely cumulative of the information contained in a long history of the claimant's treatment pre-

viously submitted by Dr. Fresh. Dr. Raggio's report is also essentially cumulative. If anything, Raggio's report may indicate a deterioration of a pre-existing, non-disabling condition. A remand is not the proper remedy for the subsequent deterioration of the claimant's condition, but may serve as a foundation for a new claim. Johnson v. Heckler, supra; Szubak v. Secretary of Health and Human Services, 745 F.2d 831 93d Cir. 1984); Ward v. Schweiker, 686 F.2d 762 (9th Cir. 1982).

For the reasons stated above, the claimant's motion for a rehearing is DENIED.

SIGNED in Alexandria, Louisiana on 26 November 1986.

/s/F. A. Little, Jr.
F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

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DEPARTMENT OF
HEALTH & HUMAN
SERVICES

Social Security
Administration

Office of Hearings
and Appeals

Name and Address of Claimant:

Perry O. Miller
Rt. 1 Box 151A
Vick, LA 71372

NOTICE OF DECISION - DENIAL
PLEASE READ CAREFULLY

If you disagree, in whole or in part, with the enclosed decision you have the right to request the Appeals Council to review it within 60 days from the date of receipt of this notice. It will be presumed that you received this notice within 5 days after the date shown below unless you show us that you did not receive it within the 5-day period.

You (or your representative) may file the request for Appeals Council review of your case at your local Social Security Office or at the hearing

office. The request can be made either in person or by mailing a letter to these offices. You may also mail the request for review directly to the Appeals Council, Office of Hearings and Appeals, P.O. Box 3200, Arlington, VA 22203.

Unless you timely request review, you may not obtain a court review of your case (sections 205(g), 1631(c)(3) or 1869(b) of the Social Security Act).

This notice and enclosed copy of
decision mailed
January 3, 1986

cc:
Name and Address of Representative:
Darwin Vizzier, Attorney
P. O. Box 1311
Alexandria, LA 71309

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DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF:

Perry O. Miller
(Claimant)

CLAIM FOR:
Period of Disability
and Disability Insurance
Benefits

436-62-5322
(Social Security Number)

This case is before the Administrative Law Judge on a request for hearing. The Administrative Law Judge has carefully considered all the documents identified in the record as exhibits, the testimony at the hearing and arguments presented.

ISSUES

The general issues are whether the claimant is entitled to a period of disability and disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, as amended. The Social Security Act defines

"disability" as the inability to engage in any substantial gainful activity due to physical or mental impairment(s) which can be expected to either result in death or last for a continuous period of not less than 12 months.

The specific issues are whether the claimant was under a "disability" and, if so, when such disability commenced and the duration thereof; and whether the disability insured status requirements of the Act are met for the purpose of entitlem

APPLICABLE REGULATIONS AND EVALUATION OF THE EVIDENCE

Pursuant to the Act, the Secretary has established Social Security Administration Regulations No. 4. The regulations provide steps for evaluating disability (20 CFR 404.1520(a)). In addition, a claimant's impairment must meet the 12 month duration requirement before being found disabling. A set order is followed to determine whether an individual is disabled. If

it is determined that a claimant is or is not disabled at any point in the review, further review is not necessary.

Social Security Administration Regulations No. 4 requires the Administrative Law Judge to consider the following in sequence:

1. An individual who is working and engaging in substantial gainful activity will not be found to be "disabled" regardless of medical findings (20 CFR 404.1520(b));

2. An individual who does not have a "severe impairment" will not be found to be "disabled" (20 CFR 404. 1520(c));

3. If an individual is not working and is suffering from a severe impairment which meets the duration requirement and which "meets or equals a listed impair-

ment in Appendix 1 of Subpart P of Regulations No. 4, a finding of "disabled" will be made without consideration of vocational factors (20 CFR 404.1520(d));

4. If an individual is capable of performing work he or she has done in the past, a finding of "not disabled" must be made (20 CFR 404.1520(e));

5. If an individual's impairment is so severe as to preclude the performance of past work experience and residual functional capacity must be considered to determine if other work can be performed (20 CFR 404.1520(f)).

The rules set out in Appendix 2 of Subpart P of Regulations No. 4 are considered in determining whether a claimant with exertional impairments is or is not disabled. The regulations also provi-

des that if an individual suffers from a nonexertional impairment as well as an exertional impairment, both are considered in determining residual functional capacity (20 CFR 404.1545). If a finding of disabled cannot be made based on strength limitations alone, the rules established in Appendix 2 are used as a framework in evaluating "disability." In cases where the individual has solely a nonexertional impairment, a determination as to whether disability exists shall be based on the principles in the appropriate sections of the regulations, giving consideration to the rules for specific case situations in Appendix 2.

There is no indication that claimant has engaged in substantial gainful activity at any time since March 15, 1984, the alleged onset of his disability. Claimant is alleging inability to work due to injury to his back, loss of reflexes in his left leg, diabetes, kidney stones and depression.

After carefully studying the record, the undersigned has concluded that claimant has a severe impairment as defined in section 404.1521 i.e., an impairment which significantly limits his ability to meet basis demands of work activity.

The record does not show an impairment which meets or equals the severity of any impairment listed in Appendix 1 to Subpart P. Claimant's impairment is not attended by the finding specified for any impairment included in the Listings nor do the reported findings indicate that claimant has an impairment which approaches the level of severity contemplated in Appendix 1. Disability cannot, therefore, be established under section 404.1520(d).

Following the sequential steps outlined above, the next step to consider is whether, in spite of a severe impairment, claimant has the residual

functional capacity to perform his past work. The record shows claimant was hospitalized May 29, 1984 at St. Francis Cabrini Hospital, Alexandria, and discharged June 5, 1984. A history was given of admission following out-patient conservative treatment for recurrent back and leg pain following a repeat injury. A lumbar myelogram performed May 29, 1984 showed mild bilateral nerve root impingement, but no herniation. A CT scan also showed no herniation, but showed possible stenosis. (Exhibit 12)

A consultative evaluation by an internist, Dr. Mohammad Ahmad, showed positive straight leg raising, more on the left, tenderness at L3-4, and diminished sensation to pinprick on the left leg. Deep tendon reflexes were exaggerated to 3+ on the left, but there was no gross motor or sensory deficit despite claimant's significant limp t the left. Dr. Ahmad diagnosed back injury with

degenerative disc disease with signs suggestive of sciatica nerve compression, also diabetes mellitus. (Exhibit 13, February 19, 1985)

Claimant's treating physician, Dr. Charles B. Fresh, a neurological surgeon and general surgeon, furnished records from early 1980, and reported that claimant underwent L4-5 and L5-S1 discectomy in 1980. Dr. Fresh said the claimant reportedly injured his back and legs on March 15, 1984 while at work. Based on his examination of April 14, 1984, claimant had positive straight leg raising at 70 degrees. Motor examination revealed mild to moderate weakness and reflexes were plus 3 throughout except for the absent left ankle reflex. Claimant was treated with Flexoril and Decatron dosepak and told to return in two weeks. Although claimant's symptoms improved somewhat, his back pain persisted, and he continued to walk with a pronounced limp on the

left. Dr. Fresh discussed admitting claimant for a repeat lumbar myelogram. Claimant was still symptomatic in August and September 1984 but range of motion of his back had improved as well as right and left lateral bending. In February 1985 claimant still had a lot of discomfort in his back and into his left leg and sensory loss in the left calf and heel. Dr. Fresh recommended surgical exploration at the site of claimant's previous surgery. (Exhibit 14)

Claimant was admitted to St. Francis Cabrini Hospital on April 15, 1985 where he underwent bilateral hemilaminectomy and foraminotomy of L4-5. A lateral recessed stenosis was revealed by a mid-1984 myelogram. Claimant was discharged on the second day following surgery in markedly improved condition. (Exhibit 15)

On May 15, 1985, claimant complained of some backache at night but range of motion of the lum-

bar spine was "really quite good". Motor examination revealed "very mild weakness of the extensor hallucis longus on the left, left ankle reflex was absent and sensation was diminished in the L5-S1 dermatome pattern on the left. Claimant was advised to concentrate on getting rid of his limp with which Dr. Fresh attributed to habit. (Exhibit 14)

Dr. Fresh furnished a comprehensive report on October 11, 1985 relating claimant's entire history, and going back to initial consultation on February 15, 1980. Dr. Fresh's latest report indicates that on June 26, 1985 claimant was doing "relatively well", but his left leg pain was intermittent and related to activity. His main complaint was of easy fatigue with his legs. There was mile tenderness to palpation at L5 level but no spasm noted, and straight leg raising was possible to 90 degrees bilaterally.

On August 28, 1985, tests of range of motion of the lumbar spine showed claimant was able to reach to within eight to ten inches of his toes with some complaint of discomfort. Straight leg raising was possible to 90 degrees, and motor examination was normal. Dr. Fresh had explained claimant's latest complaints of recurrent back and leg pain, but he did not feel this represented recurrent disc herniation. He advised claimant to continue exercising and walking and to rent a whirlpool unit for morning and evening use. (Exhibit 16).

Claimant appeared at a hearing in Alexandria, Louisiana August 27, 1985, accompanied by a witness, Mary Miller, his wife. He was represented at the hearing by Darwin Vizzier, an attorney at law.

Claimant testified that he was 44 years of age, born November 13, 1941. He quit school in the

tenth grade, and an read, write, add and subtract. Claimant's past work as a welder and mechanic in construction of a lock and dam. The work was heavy and required that he be on his feet. He last worked March 15, 1984.

Claimant stated that he does not drive since his surgery. He testified that he requires assistance in bathing and dressing, that he does not odd jobs or housework. He watches some television, and visits family members near his home.

Claimant complained of pin in his back and both legs with no relief from surgery. He used a cane for walking after his surgery but stopped about a month ago.

Claimant's wife testified that claimant walks in the yard for short periods and takes naps, but does no housework and very little reading.

Claimant does no shopping, but he goes with his wife and waits in the car.

As established by the evidence, claimant sustained a back injury on March 15, 1984 and underwent back surgery in April 1985 for bilateral lateral recessed stenosis of the lumbar spine. While claimant seemed disabled at the time of the hearing, he was only four months postoperative. The objective findings of claimant's treating surgeon reflect an ability for light work until surgery in April 1985, and again, within less than 12 months afterwards. Claimant's testimony of pain appears to be exaggerated

The limitations established by the objective evidence, statements made by the claimant and the other evidence of record show that he is precluded from the performance of his past work as welder and mechanic in construction, which, as

he described it, involved medium physical exertion. The claimant cannot do that type of work primarily because of the excessive lifting and straining involved. Considering the exertional restrictions imposed by the claimant's severe impairment, it is found that he has the residual functional capacity for the performance of light work as defined in section 404.1567 and Social Security Rule 83-10. Light work involves lifting no more than 20 pounds at a time, lifting 10 pounds frequently, walking and/or standing about six hours during an eight-hour day and sitting intermittently a total of two hours a day.

The final step in the sequential evaluation process, under section 404.1520(f) requires consideration of the claimant's residual functional capacity age, education and past work experience to see if he can do other work. It has already been determined that the claimant has the resi-

dual functional capacity for light work. Claimant was 42 years of age at the alleged onset date and is presently 44 years of age so that he has been a "younger individual," as defined in section 404.1563(b) at all times pertinent to this decision. The claimant has a tenth grade limited education as defined in section 404.1564(b)(4). His work as welder and mechanic in construction would be considered at least semi-skilled work as defined in section 404.1568.

Section 404.1569 and section 200.00 of Appendix 2 to Subpart P. provide a basis for determining the claimant's capacity for other work in view of his age, education, relevant work experience and established residual functional capacity. Section 200.00 includes notice of the existence of unskilled jobs at the various levels of exertion and states, as does Social Security Ruling 83-11, that the rules promulgated direct a

conclusion of "disabled" or "not disabled" where the record shows solely exertional limitations and the findings of act made with respect to a particular individual's vocational factors and residual functional capacity coincide with all of the criteria of the Rule. In this case the pertinent findings would coincide with the criteria of Rule 202.18 which directs a conclusion that claimant is not disabled. Accordingly, it is the decision of the Administrative Law Judge that disability is not established in accordance with section 404.1520(f).

6.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant met the disability insured status requirements of the Act on March 15, 1984, the date the claimant stated he

became unable to work, and continues to meet them through the date of this decision.

2. The claimant has not engaged in substantial gainful activity since March 15, 1984.

3. The medical evidence establishes that the claimant has severe back disorder and is post two back surgeries, but that he does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.

4. Claimant's testimony of pain appears to be exaggerated in view of the objective findings of claimant's treating surgeon which reflected an ability for light work up until April 1985 and again within less than 12 months afterwards.

5. The claimant has the residual functional capacity to perform the physical exertion requirements of work except for lifting more than 20 pounds. There are no nonexertional limitations. (20 CFR 404.1545).

6. The claimant is unable to perform his past relevant work as welder and mechanic.

7. The claimant has the residual functional capacity to perform the full range of light work (20 CFR 404.1567).

8. The claimant is 44 years old, which is defined as a younger individual (20 CFR 404.1563).

9. The claimant has a limited tenth grade education (20 CFR 404.1564).

10. In view of the claimant's age and residual functional capacity, the issue of transferability of work skills is not material.

11. Section 404.1569 of Regulations No. 4 and Rules 202.18, Table No. 2 of Appendix 2, Subpart P. Regulations No. 4, direct a conclusion that considering the claimant's residual functional capacity, age, education, and work experience, he is not disabled.

12. The claimant was not under a "disability" as defined in the Social Security Act, at any time through the date of this decision (20 CFR 404.1520(f)).

7.

DECISION

It is the decision of the Administrative Law Judge, that, based on the application filed on January 4, 1985, the claimant is not entitled to a period of disability or disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act.

/s/E. Wilson Crump, II
E. Wilson Crump, II
Administrative Law Judge
January 3, 1986
Date

AMENDED CERTIFICATE

I hereby certify that three (3) copies of the Petition for Writ of Certiorari has been sent to Ms. Sonia P. Cassidy, Assistant United States Attorney, Western District of Louisiana, 3B12 Federal Building, 500 Fannin Street, Shreveport, Louisiana 71101, and to Solicitor General, Department of Justice, Washington, D. C. 20530, by placing same in the United States Mail, postage prepaid, properly addressed, this 13th day of November, 1987, at Alexandria, Louisiana.

Kathryn Fowler Van Hoof
OF COUNSEL